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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 368

RISS & COMPANY, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA.

STATEMENT AS TO JURISDICTION.

In compliance with Paragraph 1 of Rule 12 of the Supreme Court of the United States, Riss & Company, Inc., submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory provisions believed to sustain the jurisdiction are Sections 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4); U. S. C., Title 28, Sec. 345) and Section 210 of the Judicial

Code (38 Stat. 220, 28 U. S. C. 47a) and, particularly, the following provision thereof:

> "A final judgment or decree of the District Court in the cases specified in Section 44 of this Title may be reviewed by the Supreme Court of the United States if an appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases * * *."

B. The Statute of the United States, a construction of which is involved herein, is the Act of August 9, 1935, 54 Stat. 923, 919 and 924; 49 U. S. C. Sections 306 (a), also known as Section 206 (a) of the Motor Carriers Act of 1935, containing the following provisions:

> Section 206 (a), as amended June 29, 1938; and September 18, 1940, 49 U. S. C. 306; 54 Stat. L. 923, prohibits operation by a common carrier by motor vehicle unless it has first received a certificate of public convenience and necessity. It also provides that if any such carrier or its predecessor in interest was in bona fide operation on July 1, 1935 "and has so operated since that time * * * except * * * as to interruptions of services from which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public conveniences and necessity will be served by such operation, * * *,"

C. The decree sought to be reviewed was entered on June 23, 1943, and the petition for appeal was presented to the District Court on August 13, 1943.

D. This action grows out of the Motor Carriers Act of 1935, Interstate Commerce Act, Part II, 49 U. S. C. 301 et seq., under which the Interstate Commerce Commission, on June 1, 1935, assumed jurisdiction of all motor trucking

companies engaged in transporting merchandise from state to state.

By the provisions of the Act, those motor carriers who have been in operation prior to the enactment were entitled to be granted a certificate of continue in business without any showing other than prior operations and these rights were commonly known as "Grandfather Rights." In its report (Sooner Distributing Company, Inc., Common Carrier Application, 22 M. C. C. 541) which appellant assailed in the District Court the Interstate Commerce Commission found that the Sooner Distributing Company, Inc., appellant's predecessor in interest, had qualified in every respect for such a certificate by virtue of its operations up to and including June 29, 1937, at which time there was an interruption of service, the events leading up to which are as follows:

An application for a certificate of public convenience and necessity having been seasonably filed by Sooner Distributing Company, Inc., with the Interstate Commerce Commission, it was set for hearing which was held on April 9 and May 6 and 7, and on August 13, 1937, the examiner recommended that Sooner Distributing Company, Inc. be granted a certificate of public convenience and necessity under the so-called "grandfather" clause. Petitions were filed on September 20 and 30, 1937, by certain rail and motor carrier protestants stating that subsequent to the hearing the Sooner Distributing Company, Inc. had become insolvent, had been in bankruptcy proceedings and had ceased operations, and requesting a further hearing respecting such matters. At this time Riss & Company, Inc., the appellant, having purchased the operating rights of the applicant, intervened and participated in the further hearing, which was subsequently held.

The Commission found, and such findings are accepted by the appellant, that on May 12, 1937, the Sooner Distribut-

ing Company, Inc. filed a petition with the United States District Court for the Northern District of Oklahoma stating that some of its motor vehicles had been attached in Missouri because of its inability to pay certain salaries. An allegation of insolvency was made, and it was prayed that it be reorganized under Section 77 (b) of the Bankruptcy Act. On the same day an order was entered approving the petition and continuing the applicant in possession of its property, and ordering the return of all property which had previously been attached. On June 3, 1937, the Court issued an order appointing two trustees to take possession of the debtor's estate and continue the operation of the business and to submit within thirty days a plan of reorganization.

On June 21, 1937, the cotrustees petitioned the court stating (1) that the business was being conducted at a loss; (2) that the debtor was bankrupt; (3) that no plan of reorganization had been submitted and that it was improbable that any such plan acceptable to interested parties could be offered; and (4) that there was no chance of raising sufficient working capital to permit debtor to operate with any reasonable hope for success in its business. The petition prayed for an order liquidating the debtor's estate.

On June 29, 1937, the debtor was adjudged bankrupt and the matter was referred to a referee in bankruptcy, and the business was ordered to be discontinued forthwith, and the trustees were ordered to assemble all of the movable property. An interruption of service occurred on June 29, 1937, but, as the Commission found, there had been continuous operation from a time prior to June 1, 1935 to June 29, 1937.

On July 8, 1937, application was made by the trustees to the referee in bankruptcy for an order setting a date for the sale of all certificates and permits which had been issued to the applicant. July 16, 1937, was set as the date of the sale; the highest bid received on that date was $10,000.00,

which was rejected upon the recommendation of the trustees and protests of the principal creditors. Riss & Company, Inc., then offered $17,500.00 which was accepted, and on July 20, 1937, the property was conveyed to Riss for said amount.

Riss & Company, Inc. subsequently applied to the Interstate Commerce Commission for approval of the purchase of the rights, but action on this application was delayed until the determination by the Commission of the "grandfather" rights of Sooner Distributing Company, Inc., which were determined by the order which was assailed by the appellant in the District Court.

Exceptions were seasonably filed to the said report and thereafter on April 6, 1940, Division 5 of the Interstate Commerce Commission denied the application on the grounds that there had been an interruption of service within the control of the applicant and that all "grandfather" rights were lost thereafter.

A petition for re-argument and re-consideration of the application before the entire Interstate Commerce Commission was seasonably filed in November, 1940.

E. The questions presented are substantial and of great importance to numerous motor carriers whose "grandfather" rights to certificates have not as yet been determined. The District Court's decision in this case approves the application of the so-called "Gregg-principle" to facts which are quite different from those in the *Gregg* case (316 U. S. 74). This opens the way for the Interstate Commerce Commission to apply a harsh rule of law in such a way as to destroy rights wherever there has been a bankruptcy proceeding accompanied by any interruption of service by a motor carrier, regardless of the reason for the interruption. It is believed that the *Gregg* case neither requires nor sanctions such a result and that a determination to that effect is in the public interest.

F. The following decisions sustain the jurisdiction of the Supreme Court to entertain an appeal in this case:

United States v. *N. E. Rosenblum Truck Lines, Inc.*, 315 U. S. 50;
Lubetich v. *United States*, 315 U. S. 57;
Gregg Cartage & Storage Company v. *United States*, 316 U. S. 74;
United States v. *Maher*, 307 U. S. 148.

Respectfully submitted,

H. D. Driscoll,
1025 Connecticut Ave.,
Washington, D. C.,
Counsel for Appellants.
H. Russell Bishop,
1025 Connecticut Ave.,
Washington, D. C.,
Counsel for Appellants.

FINAL DECREE.

This cause having come on for trial on the 23rd day of June, 1943, and having been submitted upon the pleadings, without the introduction of any evidence by either party, and argument of counsel for plaintiff and defendants having been heard, and the court being of opinion that the case is indistinguishable upon the law and the facts from the case of *Gregg Cartage & Storage Co.* v. *United States*, 316 U. S. 74, and under the authority thereof should be dismissed,

It Is Therefore Ordered, Adjudged and Decreed that the complaint in the above styled case be and the same hereby is dismissed at the cost of the plaintiff.

ALFRED P. MURRAH,
United States Circuit Judge;
ROYCE H. SAVAGE,
United States District Judge;
STEPHEN S. CHANDLER, JR.,
United States District Judge.

Endorsed: Filed Jun. 23, 1943. H. P. Warfield, Clerk, U. S. District Court.

Recorded: J 6—P. 401.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 368

RISS & COMPANY, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA.

BRIEF IN OPPOSITION TO THE MOTION TO AFFIRM.

H. D. DRISCOLL,
H. RUSSELL BISHOP,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 368

RISS & COMPANY, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM JUDGMENT.

Statement.

This is a direct appeal from the final decree of a specially constituted district court of three judges entered on June 23, 1943, dismissing the appellant's complaint. The appeal was allowed on August 13, 1943, and the United States filed a Motion to Affirm, and served a copy thereof on plaintiff-appellant, on August 31, 1943.

The appellant is a motor carrier which purchased certain permits and certificates of Sooner Distributing Company, Inc., a bankrupt. At the time of the sale Sooner, hereinafter referred to as the applicant, was an applicant for a certificate of public convenience and necessity under

the so-called "grandfather" clause of the Motor Carrier Act (49 U. S. C. 306). A hearing had been held on this application, but before a determination was made by the Commission, financial difficulties supervened and certain protestants filed petitions with the Interstate Commerce Commission setting forth the financial difficulties of the applicant requesting a further hearing be held with respect to such matters.

The Interstate Commerce Commission found the following facts which are binding upon both the plaintiff-appellant and the defendants-appellees, as no evidence was offered at the trial. The facts are found in 22 M. C. C. 542 to 544 inclusive:

> "On May 12, 1937, 5 days after the conclusion of the earlier hearing, applicant filed a petition with the United States District Court in and for the Northern District of Oklahoma, stating that a "good number" of its motor vehicles had been attached at Springfield and St. Louis, Mo., by reason of its inability to pay certain employees' salaries but alleging its solvency and praying that it be temporarily continued in possession of its property pending reorganization under the terms of section 77B of the Federal Bankruptcy Act. The court issued an order on the same date, May 12, 1937, approving the petition and requiring that all property previously attached be returned to applicant. The order further provided that applicant be continued in possession of its property, under the direction of its general manager, and that it continue to operate its business pending a hearing before the court of June 2, 1937.
>
> "On June 3, 1937, the court issued an order appointing two cotrustees to take possession of the debtor's estate, to continue to operate it under the jurisdiction of the court, and to submit to the court within 30 days a plan of reorganization.
>
> "Thereafter, on June 21, 1937, the cotrustees petitioned the court stating (1) that the business was

being conducted at a loss; (2) that the debtor was bankrupt; (3) that no plan of reorganization had been submitted and that it was improbable that any such plan acceptable to interested parties could be offered; and (4) that there was no chance of raising sufficient working capital to permit debtor to operate with any reasonable hope for success in its business. The petition prayed for an order liquidating the debtor's estate.

"On June 29, 1937, the court issued an order adjudging debtor to be a bankrupt, referring the matter to a referee in bankruptcy, ordering the discontinuance of the business forthwith, and requiring the assembling of all movable property by the trustees.

* * * * * * *

"On July 8, 1937, the cotrustees made application to the referee in bankruptcy for an order setting a date of the sale of certain certificates and permits issued by various State authorities to applicant "and any other such certificates or permits under control of the bankrupt, if any". That application urged prompt action so that the value of such rights should not be "materially reduced or lost" by "cancellation of the issuing authorities". The referee in bankruptcy thereupon issued an order setting the date of sale as July 16, 1937. The highest bid received on that date for such rights of applicant was $10,000, which was offered by another motor carrier, "conditioned that the transfer of said permits and certificates should be approved by jurisdictional bodies controlling the same * * * or if at a later date the jurisdictional bodies having control of the approval of the transfer of said permits and certificates failed to approve the transfer of any part of said permits and certificates that a refund would be made to the said bidder on a mileage basis". This bid, upon recommendation of the trustees and protests of the principal creditors, was rejected by the referee and further competitive bids, by three motor carriers, were offered in open court, the highest of

which was $17,500 offered by Riss, intervener herein. This bid was accepted after the court "fully advised all bidders as well as the Riss & Company, Inc., that said bid was being accepted unconditionally and for cash," and such rights as the bankrupt estate had in such property were conveyed to Riss on July 20, 1937, "without any guarantee, restriction or reservation as to the validity of the transferability," of such rights. The $17,500 was paid by Riss and has been distributed with other assets to the creditors of the bankrupt.

"Application was filed with this Commission on September 16, 1937, by Riss seeking approval under section 213 of the act of the purchase of any interstate operating rights to which applicant may be entitled. No. MC-F-422, Riss & Co., Inc.-Purchase-Sooner Distributing Company, Inc. (E. J. Bowers and Chas. E. DeVaux, Cotrustees). Action thereon has been withheld pending a final determination of the issues in this proceeding, and no operations based upon the transfer have been conducted by Riss."

The Commission denied the application on the authority of the so-called *Gregg* case (Gregg Cartage and Storage Company, 21 MCC 17; affirmed 316 U. S. 74). The plaintiff-appellant thereupon instituted an action in the District Court of the United States for the Northern District of Oklahoma assailing the determination of the Commission. The case was disposed of after argument by dismissing the complaint upon the ground that the case was indistinguishable from the *Gregg* case either upon the facts or upon the law.

I.

As the Government has stated in its Motion to Affirm, the basic question involved here is whether or not the decision in the so-called *Gregg* case governs the disposition of this case. In its broader aspects, however, the case involves the question of whether or not every instance where a motor carrier which is an applicant under the "grand-

father'' clause of the Motor Carrier Act becomes involved in financial difficulties followed by an interruption of service is to be denied the granting of the application on the ground that the interruption of service was within the control of the motor carrier.

A review of the decision of the Interstate Commerce Commission since its own decision in the *Gregg* case, 21 MCC 17, and the decision by this court of the same case, 316 U. S. 86, will disclose that the Commission has used the so-called Gregg principle as an easy method of disposing of ''grandfather'' applications and of destroying the rights of many carriers.

Upon the narrow issues involved in this case, however, the plaintiff-appellant submits that there is sufficient difference in the facts obtaining in the *Gregg* case and the instant case to require a finding that the Gregg principle does not apply. In the *Gregg* case the interruption of service took place before the adjudication in bankruptcy. A receiver had been appointed by a state court and his sole activity with respect to the operations of the business had consisted in disposing of the business on hand. He neither solicited nor accepted any new business. Thus, when the bankruptcy court acquired jurisdiction, it found the business at a standstill and since no application for authority to continue the business was sought or granted, the Commission and this court found that the interruption because of bankruptcy was one of which it could not be said that the applicant ''had no control over.''

In the instant case, however, the bankruptcy court under authority of Section 77B of the Bankruptcy Act had appointed trustees to continue the business under the direction of the court, and operations were continued up to the time of the adjudication of bankruptcy. When that adjudication took place, the court, and not the trustees nor the applicant itself, brought about the interruption of service. The court

in entering its order of adjudication ordered the discontinuance of the business and the collection of all movable property for the purpose of selling at the earliest possible time. The facts as found by the Commission and as set forth above disclose that the arrangements were made for the sale with reasonable promptness. Since the interruption of service for this short period of time was one which was brought about by the order of the court, it is one which should not be charged to the applicant but to the court.

In the case of *Shawmut Transportation Company* v. *United States*, 49 F. Supp. 41, which is discussed at length in the Motion to Affirm, the court held that the interruption which occurred in that case was attributable not to the bankruptcy of the applicant, but to certain circumstances surrounding the sale which was held under the supervision and authority of the bankruptcy court, and, therefore, the court held that the interruption was attributable to the sale, not the bankruptcy. It is submitted that an interruption brought about by the explicit order of a bankruptcy court which had complete jurisdiction over the matter is solely attributable to the court and not to the hapless applicant which has gone bankrupt.

II.

The decision of the lower court and the contentions of the United States in this case would bring about the automatic application of the so-called Gregg principle to any situation where a motor carrier which was an applicant under the "grandfather" clause had become a bankrupt and had suffered an interruption of service following the bankruptcy. Such a contention argues for the disregard of a principle which this court has announced many times to the effect that the authority of a case is confined to the facts upon which the decision was based. *Sterling* v. *Constantin*, 287 U. S.

378; *White* v. *Aronson*, 302 U. S. 16; *Wright* v. *United States*, 302 U. S. 583.

The adoption of such a theory may, as was said by Mr. Justice Douglas in his dissenting opinion in the *Gregg* case, "alleviate the administrative chore". It certainly is not consistent with the repeated holdings of this court.

III.

The question involved is substantial. Many "grandfather" applications are still pending before the Commission and the question involved, as stated above, is whether or not the Commission is really to investigate the facts of each case or blindly use the authority of the *Gregg* case to dispose of any application where there has been bankruptcy and an interruption of service.

The Motion to Affirm should be denied.

H. D. Driscoll,
H. Russell Bishop,
Attorneys for Plaintiff-Appellant.

In the District Court of the United States for the Northern District of Oklahoma

CIVIL No. 525

RISS & COMPANY, INC., PLAINTIFF-APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913. The decree, entered on June 23, 1943, dismissed appellant's complaint. An appeal to the Supreme Court was allowed on August 13, 1943, and the United States was served with the appeal papers on August 18, 1943.

Appellant's suit was one to set aside an order of the Interstate Commerce Commission dated April 6, 1940 (22 M. C. C. 541), denying appel-

lant's predecessor a certificate as a common carrier of property by motor vehicle under the "grandfather clause" of Section 206 of Part II of the Interstate Commerce Act (49 U. S. C. 306.[1]) Appellant did not contest the facts, accepting the findings made by the Commission in its report of April 6, 1940.

The only issue raised in appellant's assignment of errors is the question of law whether, upon the facts found by the Interstate Commerce Commission, the District Court was correct in holding, under the authority of *Gregg Cartage & Storage Co.* v. *United States,* 316 U. S. 74, that the interruption of service following the bankruptcy of appellant's predecessor in interest was not an interruption of service "over which the applicant or its predecessor in interest had no control" within the meaning of Section 206 (a) of the Act,[2] and

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[1] Appellant's complaint also sought to set aside the Commission's order of May 2, 1940 (35 M. C. C. 383), disposing of its application under Section 213 of Part II of the Interstate Commerce Act (49 U. S. C. 313) for approval of the purchase of its predecessor's operating rights. Since this order was based on the conclusion reached in the order of April 6, 1940 that appellant's predecessor had no "grandfather" operating rights, because of interruption in service, and thus could transfer nothing to appellant, no additional questions are presented with respect to the order of May 2, 1940.

[2] Section 206 (a) provides (49 U. S. C. 206 (a)):

"Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or

that it was therefore fatal to the existence of "grandfather" rights.

From the Commission's report, it appears that appellant's predecessor in interest, the original "grandfather" applicant, Sooner Distributing Company, Inc., filed a petition on May 12, 1937, with the United States District Court for the Northern District of Oklahoma under Section 77b of the Bankruptcy Act. On the same date, the court approved the petition, and provided that applicant be continued in the possession of its property and continue to operate its business pending a hearing set for June 2, 1937. On June 3, 1937, two trustees were appointed by the court to take possession of the debtor's estate and continue to operate it under the jurisdiction of the court and to submit within 30 days a plan of re-

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within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to

organization. On June 21, 1937, the trustee petitioned the court for an order liquidating the debtor's estate, because the business was being conducted at a loss; there was no chance of raising sufficient working capital; the debtor was bankrupt; and no successful plan of reorganization could be offered. On June 29, 1937, the court adjudged the debtor to be a bankrupt and ordered the discontinuance of the business forthwith. All operations were discontinued on June 29, 1937, and have not since been resumed.

On July 8, 1937, the trustees applied to the referee in bankruptcy for an order to sell certain certificates and permits issued by various State

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the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307 (a) of this chapter and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter."

authorities "and any other such certificates or permits under control of the bankrupt, if any." At the sale on July 16, 1937, the highest bid received for such rights was $10,000. This bid was conditioned on approval of the transfer by the regulatory bodies having authority in the premises. The bid was rejected by the referee, and further bids were offered in open court, the highest of which was $17,500, offered by appellant. This bid was accepted after the court fully advised all bidders, including appellant, "that said bid was being accepted unconditionally and for cash." Such rights as the bankrupt estate had were conveyed to appellant on July 20, 1937, "without any guarantee, restriction, or reservation as to the validity of the transferability" of such rights. The price paid by appellant has been distributed with other assets to the creditors of the bankrupt.

On September 16, 1937, appellant applied to the Interstate Commerce Commission for approval of the purchase. This application was dismissed by the Commission on May 2, 1940, action thereon having been withheld pending determination of the "grandfather" proceeding by the Commission. On April 6, 1940, the Commission denied the "grandfather" application on the ground that there had been an interruption of service, as in the *Gregg* case, 10 M. C. C. 255, 21 M. C. C. 17.[3]

[3] The Commission's decision in the *Gregg* case was upheld by the District Court and the Supreme Court, 42 F. Supp. 266, 316 U. S. 74.

It is submitted that the decree of the District Court should be affirmed without argument because the appeal therefrom presents no substantial question. The District Court correctly held that the instant case is indistinguishable from *Gregg Cartage & Storage Co.* v. *United States,* 316 U. S. 74, 82–83.[4] Appellant asserts that the facts here are somewhat different from those in the *Gregg* case, and it relies upon *Shawmut Transportation Company, Inc.* v. *United States,* 49 F. Supp. 831 (D. Mass.), which was decided a year after the *Gregg* case. Appellees submit, however, that such differ-

[4] In fact, the case at bar was postponed by stipulation pending decision in the *Gregg* case, which was decided April 13, 1942. The present suit was instituted on February 7, 1941. On or about July 17, 1941, at the suggestion of appellant's counsel, the following stipulation was entered into:

"It is hereby stipulated by and between the parties hereto by their respective counsel, as follows:

"I. A case known as *Gregg Cartage & Storage Company, Hugh W. Wells, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, and Northeastern Transportation Company, Appellants,* vs. *The United States of America and Interstate Commerce Commission, Appellees,* now pending on appeal to the Supreme Court of the United States from the District Court of the United States for the Northern District of Ohio, Eastern Division, the order allowing the appeal in said case having been signed July 14, 1941, involves questions of law similar to those involved in the above entitled case.

"II. The trial of the above entitled case shall be postponed until some date subsequent to the entry of a final judgment by the Supreme Court of the United States in the said case of *Gregg Cartage & Storage Company et al.,* vs. *The United States of America et al.*"

ences as may exist with respect to the facts between the present case and the *Gregg* case are entirely immaterial, and that even if the *Shawmut* case be accepted as authoritative it is not controlling here.

In the *Gregg* case, a carrier was forced into bankruptcy while its "grandfather" application was pending. In large part, its plight was due to the insolvency of an insurance company, necessitating payment of large claims by the carrier, as well as premiums for new insurance. The carrier arranged for a receivership in a court of the State of Ohio, the company's counsel being appointed receiver on October 4, 1937.[5] On the same day, creditors field a petition in the United States District Court, which on October 27, 1937, adjudicated the company a bankrupt, and on October 30, 1937, appointed a receiver. The receiver took over the business on the day of his appointment, but conducted no operations at any time.[6] On December 6, 1937, he sold the bankrupt's rights to a corporate purchaser which applied to the Commission on January 7, 1938, for approval of a transfer.

On these facts, the Supreme Court held that a certificate under the "grandfather clause" had properly been denied, pointing out (316 U. S. 74, 80, 82–83) that:

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[5] The state receiver merely delivered shipments on hand and did not solicit or accept any new business.

[6] The Commission found that no operations had been conducted since October 30, 1937. 10 M. C. C. 255, 260.

The Commission was warranted in holding as a matter of law that the interruption because of bankruptcy was not one over which the applicant had no control within the meaning of the Motor Carrier Act. The complexity of the chain of causation shown in this case makes it an apt illustration of the impracticability of any other rule.

* * * * *

Furthermore, the interruption of service was the deliberate act of those who for the time being stood in the position of applicant and owned its rights. During the interval between receivership and sale of these rights to Northeastern, we take it that the beneficial interest therein vested in the creditors and the legal title in the receiver or trustee. The federal receiver or trustee could have been authorized to conduct the business of the bankrupt for a limited period, if in the best interests of the estate. Par. 2 of the Act of July 1, 1898, as amended, 11 U. S. C. Par. 11. The creditors and their representatives, however, failed to seek such authority, evidently regarding the rights, which later sold for $850, not worth the expense and risk of continuing business. It is the purchaser Northeastern, organized to acquire the "grandfather" rights, and to an undetermined extent identified with the management of the bankrupt, which, having bought these rights in this state of voluntarily suspended animation, seeks to revive

them. But it cannot say that it takes the rights free of any impairment by the voluntary suspension of operation by the then owner from whom it derives title.

* * * * *

In its opinion the Commission stated that "it is useless to speculate upon the question whether the 'grandfather' right expired before or after the sale." This we understand to mean that, having determined that the cessation of operations was not a matter over which Gregg "had no control," the Commission was of opinion that by the time of the sale the cessation of operations was of sufficient duration—at least 69 days—to establish that Gregg had not been "in * * * operation since" June 1, 1935, within the meaning of Par. 206 (a). This was a reasonable conclusion, especially since any substantial interruption of one carrier's service tends to result in expansion of other facilities to meet the continuing needs of shippers, and thus to cause overcrowding if the suspended service is resumed.

After the adjudication of bankruptcy in the *Shawmut* case, the RECEIVER continued operations up to the date of the sale, and the purchaser on the day after the sale applied to the Commission for approval. The District Court held that there had been no fatal interruption, since the interruption which occurred was due not to the bankruptcy but to the sale, and since the delay caused by the purchaser's inability to operate lawfully

without approval by the Commission was chargeable to the Commission rather than to the purchaser or its predecessor in interest.

The vital distinction between the instant case and the *Shawmut* case is that appellant's predecessor in interest (the trustees in bankruptcy) stopped operations before the sale. An interval of 21 days elapsed between cessation of operations by the trustees and the sale to appellant on July 30, 1937. In the *Shawmut* case, the receiver continued operations continuously up until the sale. Moreover, appellant did not exhibit the same diligence as the purchaser in the *Shawmut* case in applying to the Commission for approval of the transfer. Appellant did not apply for approval until September 16, 1937, an interruption of service of 79 days' duration. In the *Shawmut* case, the purchaser applied to the Commission for approval of the transfer on the day following the sale. Furthermore, the purchaser thereupon, finding that the transfer could not be approved immediately by the Commission, applied ten days after the sale for temporary operating authority by way of a lease of operating rights, and resumed operations as soon as temporary authority was granted. However, appellant never applied for temporary authority, even after the Motor Carrier Act of 1935 (now Part II of the Interstate Commerce Act) was amended on June 29, 1938, to provide for the granting of temporary authority in such contingencies (49 U. S. C. 310a).

The differences between this case and the *Gregg* case are immaterial; obviously, the fact that a receiver was appointed by a state court in the *Gregg* case, whereas here the entire bankruptcy proceeding was in the federal court, is not a circumstance of significance. It is true that the *Gregg* case involved an involuntary bankrupt, whereas appellant's predecessor was a voluntary bankrupt, and, moreover, the trustees here petitioned the court for leave to abandon operations and liquidate the business. But instead of strengthening appellant's position, this difference in facts causes the doctrine of the *Gregg* case to apply *a fortiori*. Furthermore, in the *Gregg* case the bankruptcy of the Gregg Company was largely due to the failure of an insurance company and here appellant's predecessor's bankruptcy was apparently due entirely to its own mismanagement. With respect to this circumstance also, the *Gregg* case would apply *a fortiori*.

The Receiver of the Gregg Company did not conduct operations at all, whereas the trustees for appellant's predecessor did operate for a time, but ceased to do so 21 days before the sale. It seems plain, nevertheless, that after the trustees in bankruptcy abandoned operations, they stood in the same position as the receiver in the *Gregg* case who had never begun to conduct operations. The duration of interruption of the Gregg service was 69 days, while here the corresponding period was

even longer, 79 days.[7] In this respect, this case is again stronger than the *Gress* case. Furthermore, as appears from the above-quoted language of the opinion in the *Gregg* case, the Commission's administrative determination with respect to the question whether the cessation of operations was of sufficient duration to extinguish "grandfather" rights will be sustained if the Commission reaches a "reasonable conclusion" (317 U. S. 74, 83).[8] No

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[7] The period of 69 days mentioned in the Court's opinion in the *Gregg* case evidently extended from the date of the receiver's appointment (October 30, 1937) to the date of application by the purchaser to the Commission for approval of the transfer (January 7, 1938), though the Court speaks as if "by the time of the sale" a sufficient period of time had elapsed to cause "grandfather" rights to be extinguished (316 U. S. at 83, quoted above). From the appointment of the receiver to the date of the sale (December 6, 1937) in the *Gregg* case would be 37 days, as compared with 21 days' interruption prior to the sale here. In the *Shawmut* case, the sale and application to the Commission for approval were practically simultaneous, and the receiver had continued operations up to that time.

It is submitted that the entire period until application is made to the Commission may properly be included in computing the duration of the interruption of service. Delay in authorizing a purchaser to operate is surely not chargeable to the Commission until after application has been made to it for such authority, and the date of making such application is plainly a matter within the purchaser's control. Whether the date of the sale or the date of the application is controlling under the *Gregg* doctrine, that case is in either event fatal to appellant's contentions.

[8] The test of reasonableness is a familiar standard in judicial review of Commission decisions. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S.

particular period of time is prescribed by statute as necessary in order to constitute a fatal interruption of service,[9] and the conclusion in the present case is clearly reasonable.

Consequently, the above-quoted views of the Supreme Court in the *Gregg* case are fully applicable to appellant. The trustees could have continued to conduct the business of the bankrupt if in the best interests of the estate. However, they evidently regarded the "grandfather" rights, which they later sold en bloc, with a number of state permits and certificates, as not worth the expense and risk of continuing business. Appellant, having bought these rights "in this state of voluntarily suspended animation," cannot say that it takes them "free of any impairment by the voluntary suspension of operation by the then owner from whom it derives title" (316 U. S. at 82–83). Thus, the cessation of operations was not a matter over which appellant and its predecessors had no control; and by the time of the sale (or the time of making application to the

282, 286–7. As stated in *United States* v. *Maher*, 307 U. S. 148, 154, the determination of controverted issues with respect to whether a particular application meets the requirements of the "grandfather clause" is a task which "Congress entrusted to the Commission".

[9] Emphasizing that no particular period of time was requisite, a three-judge court for the District of Delaware in *Transamerican Freight Lines* v. *United States* (Civil No. 274, decided August 10, 1943), upheld the Commission in denying a "grandfather" application because of an interruption of 28 days until the date of the sale.

Commission for approval of the transfer), the cessation of operations was of sufficient duration to establish that plaintiff and its predecessors in interest had not been in *bona fide* operation on and since June 1, 1935, to the date of the Commission's decision,[10] within the meaning of Section 206 (a) of Part II of the Interstate Commerce Act (49 U. S. C. 306 (a)). Accordingly, the Commission and the District Court properly followed the *Gregg* case in holding that appellant's predecessor was not entitled to "grandfather" rights.

For the foregoing reasons, it is evident that the errors assigned by appellant are without substance. It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

CHARLES FAHY,
Charles Fahy,
Solicitor General,
DANIEL W. KNOWLTON,
Daniel W. Knowlton,
General Counsel,
Interstate Commerce Commission.

AUG. 31, 1943.

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[10] The "grandfather" clause requires continuous operation from June 1, 1935, until the hearing by the Commission on the application. *United States* v. *Maher*, 307 U. S. 148, 155; *Gregg Cartage & Storage Co.* v. *United States*, 316 U. S. 74, 78.

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No. 368. RISS & COMPANY, INC. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of Oklahoma. October 25, 1943.

Per Curiam: The motion to affirm is granted and the judgment is affirmed on the authority of *Gregg Cartage Co.* v. *United States*, 316 U. S. 74. Dissenting: MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS. *Messrs. H. D. Driscoll* and *H. Russell Bishop* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for appellees.